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10/728,375	12/03/2003	Russell Warner	BKCS 20.775 (331443-00003)	6387
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ARLEN L. OLSEN SCHMEISER, OLSEN & WATTS 3 LEAR JET LANE SUITE 201 LATHAM, NY 12110			BARRETT, SUZANNE LALE DINO	
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**MAILED**

**AUG 22 2005**

**GROUP 3600**

**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/728,375  
Filing Date: December 03, 2003  
Appellant(s): WARNER, RUSSELL

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Arlen Olsen  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 5/19/05.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

This appeal involves claims 1-9,12,14,15.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

No evidence is relied upon by the examiner in the rejection of the claims under appeal. (Applicant's appeal brief filed 5/19/05 does not include an Evidence Appendix.

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The examiner has attached the faxed Evidence Appendix to this Answer. See the interview summary of 8/1/05.)

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-8,12,14,15 are rejected under 35 U.S.C. 103(a) over Sutton in view of Thomas et al. This rejection is set forth in a prior Office Action, mailed on 2/8/05. It is noted that although the claim numeral "15" was erroneously omitted from the first sentence of the rejection, the body of the rejection discusses claim 15 and the PTOL-326 clearly indicates claim 15 as being rejected.

Claim 9 is rejected under 35 U.S.C. 103(a) over Sutton in view of Thomas et al as applied to claim 1, and further in view of either Crowley, Moses or Waddell. This rejection is set forth in a prior Office Action, mailed on 2/8/05.

**(10) Response to Argument**

Regarding Appellant's arguments, on page 5, lines 1-14 of the brief that the method of using the article of the instant invention distinguishes from the method of using the article disclosed by Sutton, the Examiner maintains that the method of using the device is not accorded patentable weight in the article claims. Furthermore, Appellant's argument that the Sutton device (page 5, lines 18-20) would be ill-suited for opening frozen doors...as the plastic construction may break as the user attempts to

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lever the door open" is not persuasive, since the opener of the claimed instant invention is disclosed as also being constructed of plastic (claim 8).

Regarding Appellant's arguments, on page 6, lines 1-7, that Sutton fails to teach a constant width which provides a greater surface area for effecting leverage, it is noted that Thomas et al is relied upon for this teaching as discussed in the rejection under 35 USC 103(a):

Regarding Appellant's arguments, on page 6, lines 8-20, that Thomas et al does not teach two angled portions of substantially equal length, the Examiner agrees and notes that Thomas et al is only applied against the claims as a modifying reference, in combination with Sutton, to teach a constant width along the length of the opener. Thus Appellant's arguments in this regard are moot.

Regarding Appellant's arguments, on page 6, lines 21,22 and page 7, that Sutton teaches away from the claimed invention, it is agreed that Sutton discloses in column 2, lines 55-56, that the hinge is limited to opening to "approximately forty-five degrees". Appellant's claims 1 and 4 recite a range of 45-85 degrees and this is clearly taught by Sutton. Regarding claim 9 which sets forth an angle in the range of 60-85 degrees. While the Sutton specification sets forth "approximately 45 degrees", drawing Figure 2 of Sutton discloses an angle of approximately 65 degrees. While Appellant argues that the 65 degree angle of the drawing figure directly contradicts the specification, the Examiner contends that the 65 degree angle shown in Sutton's drawing is commensurate with the disclosure of *approximately* 45 degrees and does not clearly contradict the specification. Thus, it is maintained that Sutton does not teach away from

the instant invention. Appellant's similar arguments, continued on page 8 regarding the claim 9 recitation of "60-85 degrees", are also not persuasive for the same reason. In addition, the claim 9 rejection also relies on the alternative teachings of Crowley, Moses or Waddell. Moses and Waddell disclose an angle of approximately 60 degrees as measured in the drawing figures; the specifications are silent as to the angle dimension. Crowley clearly discloses, in column 8, lines 15-23, a preferred angle for a prying tool "substantially in the range of 40 to 80 degrees", with a most preferred angle of "substantially 60 degrees".

Furthermore, in response to Appellant's arguments on page 9, lines 14-22, questioning the motivation for being led to the Crowley, Moses or Waddell references, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the field of prying tools is clearly pertinent to the frozen door *prying* tool of the claimed invention. The fact that Crowley speaks to the preferred angle range for a prying tool is further evidence that it is wholly analagous art. Accordingly, Appellant's arguments are not persuasive in this regard.

In conclusion, it is maintained that the combination of Sutton and Thomas et al clearly teach the claimed plastic opener having substantially equal, angled portions with a key ring aperture in one end, of unitary structure (note Sutton Figure 8), and with a pry angle of "approximately 45 degrees" as disclosed in the specification, and an

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approximate angle of 65 degrees as illustrated in drawing figure 2, which clearly fall within the range of 45-80 degrees recited in claims 1 and 4. The fact that the Sutton specification recites "approximately" 45 degrees opens the door to interpretation, and since the illustrated drawing discloses an angle of approximately 65 degrees, it can be inferred that the approximation may include the 65 degree angle. Thus the Sutton device is not limited to opening 45 degrees as Appellant argues with respect to claim 9 and the rejection of claim 9, which requires a range of 60-85 degrees, does not teach away from Sutton's disclosure. Furthermore, the addition of Crowley, Moses or Waddell to the rejection of claim 9, further teaches the preferred angle of 60 degrees which clearly fall within the range of 60-85 degrees recited in claim 9. Accordingly, the rejections should be sustained.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

(Applicant's appeal brief filed 5/19/05 does not include a Related Proceedings Appendix. The examiner has attached the faxed Related Proceedings Appendix to this Answer. See the interview summary of 8/1/05.)

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

  
Suzanne Dino Barrett

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Conferees:

Brian Glessner *SG.*

Lloyd Gall *Danell Payne TQAS*  
*for*